89-1229

No. _____

# SUPREME COURT of the UNITED STATES

## OCTOBER TERM, 1989

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**LORI J. JASSO, Petitioner,**

**v.**

**SHERRY A. FINNEY, Respondent.**

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## PETITION FOR A WRIT OF *CERTIORARI* TO THE SUPREME COURT OF THE STATE OF ALASKA

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## QUESTIONS PRESENTED

1. Where a State court finds that a parent's consent to termination of parental rights is invalid *ab initio* under 25 U.S.C. § 1913(a) of the Indian Child Welfare Act of 1978, but bars relief because of a State 1-year statute of limitations, did Congress intend that no statute of limitations be applied in an action to vacate an adoption judgment grounded on the invalid *ab initio* consent?

2. Assuming Congress did intend that a borrowed statute of limitations apply in such a case, is Alaska's 1-year limitations period preempted as inconsistent with 25 U.S.C. § 1921 that requires a court to apply the higher of state or federal protection for the parent, which is, in this case, the 2-year limitations period found in 25 U.S.C. § 1913(d) for vacating an adoption judgment grounded on a *voidable* consent?

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## OPINIONS BELOW

The opinion of the Supreme Court of the State of Alaska is reported at 781 P.2d 973, and is *reprinted in* the appendix hereto at page A1.

The memorandum decision of the Superior Court for the State of Alaska (Carlson, Superior Court Judge) has not been reported, but is *reprinted in* the appendix hereto at page A29.

## *JURISDICTION*

The decision of the Supreme Court of the State of Alaska was entered on October 27, 1989. App., p. A1.

Petitioner believes that 28 U.S.C. §§ 1254(1) and Supreme Court Rule 13.1 probably confer *jurisdiction* on this court because the petition seeks review of a civil action within 90 days of the entry of judgment by a court of last resort.

28 U.S.C. § 2403(a) and (b) may be applicable.

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* TNF, a minor, is a real party below, but never represented.

## STATUTES INVOLVED

U.S. Constitution, Article I, § 8:

"[1] The Congress shall have Power .....
"[2] *****
"[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. Constitution, Article VI:

"*****
"[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

25 U.S.C. § 1913(a):

**Consent; record; certification matters; invalid consents**

"Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that wither the parent of Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of

the Indian child shall not be valid."

25 U.S.C. § 1913(d):

**Collateral attack; vacation of decree and return of custody; limitations**

"After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law."

25 U.S.C. § 1914:

**Petition to court of competent jurisdiction to invalidate action upon showing of certain violations**

"Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title."

25 U.S.C. § 1914:

**Petition to court of competent jurisdiction to invalidate action upon showing of certain violations**

"Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title."

25 U.S.C. § 1921:

**Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child**

"In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard."

Alaska Stat. Ann. § 25.23.140:

**Appeal and validation of adoption decree.**

"(a) *****

"(b) Subject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued, the decree may not be questioned by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice or lack of jurisdiction of the parties or of the subject matter, unless, in the case of the adoption of a minor the petitioner has not taken custody of the minor, or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period."

## STATEMENT OF THE CASE

Petitioner Lori J. Jasso, a non-Indian, is the natural mother of TNF, born September 6, 1986 in California. Bruce F. Finey, an enrolled member of the Chickasaw Nation, is the natural father of TNF. Respondent Sherry A. Finney, a non-Indian herself, is the wife of the natural father and sister of Petitioner. TNF is eligible for enrollment in the Chickasaw Nation.

On November 2, 1986 Petitioner signed a notarized consent to termination of her parental rights and the adoption of TNF by her sister Respondent. Petitioner's consent to the adoption complied with Alaskan law, but did not comply with 25 U.S.C. § 1913(a)[1] of the Indian Child Welfare Act of 1978 (hereinafter ICWA). This is because the terms and consequences of terminating parental rights was not explained to Petitioner by a judge, nor did a judge ever certify that Petitioner understood the terms and consequences of terminating her parental rights as required by the ICWA. Respondent's notice of the hearing informed Petitioner that she had an absolute right to withdraw her consent for only 10 days after execution as provided by Alaskan law, but did not inform her that under § 1913(c) of the ICWA she had an absolute right to change her mind about the adoption and withdraw her consent anytime prior to entry of the adoption decree. Petitioner did not fly to Alaska to attend the adoption hearing, nor was she ever represented by counsel.[2]

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[1] Hereinafter references to section (§) are to 25 U.S.C., unless otherwise noted.

[2] The case below was decided without an evidentiary hearing and purely as a legal issue based on the above undisputed facts. Facts regarding the surrogate motherhood arrangement between sisters Jasso and Finney are very much in dispute, but irrelevant and unnecessary to a resolution of the legal issues raised in this petition. The concurring justice's opinion relied upon unproved allegations contained in affidavits submitted by immediate family members of the sisters. Had a hearing been necessary to resolve the legal issue presented, Petitioner would have proved the affidavits contained half-truths and deliberate falsehoods.

The judge entering the adoption decree on February 18, 1987 was aware of TNF's Indian heritage but erroneously concluded that the ICWA did not apply and granted the adoption based on compliance with Alaskan law. On April 18, 1988 Petitioner filed a Motion to Vacate Adoption pursuant to § 1914 on the grounds that her consent to termination of her parental rights was obtained in violation of § 1913(a). On November 17, 1988 the Superior Court for the State of Alaska decided that while the Indian Child Welfare Act did apply to the case, the motion was time-barred under Alaska Stat. Ann. § 25.23.140(b).[3] This state statute of limitations bars an attack on an adoption decree for any reason after 1 year from issuance, including lack of jurisdiction. Petitioner appealed.

The Alaska Supreme Court majority determined that, "The critical issue is whether Congress intended state statutes of limitations to apply to § 1914 actions to set aside consents which are *invalid* under the terms of the Act." App., p. A13. The Alaska Supreme Court affirmed the lower court decision, reasoning that,

> "Since Congress clearly intended that state statute of limitations would apply to actions pursuant to § 1913(d)[4] it is logical to assume that state statute of limitations also would apply to § 1914 actions. If Congress had intended to establish a minimum time for bringing § 1914 actions, it would have mandated a statutory minimum as it did in § 1913(d)." App., p. A14.

The majority also found that it was not inconsistent with the ICWA to borrow the State's 1-year statute of limitations for attacking an adoption judgment based on a consent *invalid* on its face, even though § 1913(d) contains a 2-year statute of limitations for attacking a judgment based on a consent which

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[3] Hereinafter, reference to Alaska Annotated States are cited as AS §, unless otherwise noted.

[4] The provision for invalidating consents obtained by fraud or duress.

is *valid* on its face, albeit obtained by fraud or duress. The majority reasoned that, "Fraud and duress are evils at least as serious as violations of the procedural protections contained in ICWA. A consent obtained in violation of § 1913 of ICWA should not be more questionable than a consent obtained through fraud or duress." App., p. A14. The majority posited that, "AS § 25.23.140[(b)] is a strong policy statement by the Alaska Legislature that an adoption decree should not be challenged on any ground after one year." App., p. A15.

The dissenting justice reasoned that § 1913(d) "delimits minimum not maximum protection; it expands not contracts the rights of Indian parents." App., p. A26. He concluded that, "Congress intended that any consent obtained in violation of the strict procedural safeguards governing termination of parental rights was to have no force or effect. It follows that an adoption based on an invalid consent is void *ab initio*, and that a petition to vacate such a void decree can, pursuant to § 1914 be filed at any time." App., p. A26.

## REASONS FOR GRANTING THE WRIT

### I

### THE STATE COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW AFFECTING PARENTAL RIGHTS UNDER THE INDIAN CHILD WELFARE ACT OF 1978 WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, BECAUSE THE DECISION APPEARS TO CONFLICT WITH CONGRESSIONAL INTENT AND PRINCIPLES ESTABLISHED BY THIS COURT THAT NO PERIOD OF LIMITATIONS SHOULD APPLY TO BRING AN ACTION FOR VIOLATIONS OF CORE PROVISIONS OF THE ACT, WHERE NO LIMITATIONS PERIOD IS PROVIDED

## A. CONGRESS INTENDED NO LIMITATIONS WHERE THE ACT HAS NOT BEEN FOLLOWED

Legislative history *conclusively* establishes that Congress intended the procedural requirements of the Indian Child Welfare Act of 1978 (ICWA) to be enforced "as of right", and not to be defeated by local practice or rules. H.R. Rep. No. 1386, 95th Cong., 2d Session. 11 (1978) (hereinafter House Report), U.S. Code Cong. & Admin. News 1978, pp. 7540, 7541. App., p. A31-A33. To support its authority to impose procedural burdens on the states, Congress *cited American Railway Express Co. v. Levee*, 263 U.S. 19, 21 (1923) where this court held, "The laws of the United States cannot be evaded by the forms of local practice ...." The local rules applied as to the burden of proof narrowed the protection that the defendant had secured [under Federal law], and therefore contravened the law." Congress intended application of state law if, but only if, the State law provides greater protection than the ICWA. § 1921.

Section 1913(a) of the ICWA declares that a voluntary consent to termination of parental rights, "shall not be valid unless..." a judge certifies "that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent..." The Alaska Supreme Court concedes that Petitioner's consent to termination of her parental rights is invalid under § 1913(a).

Section 1914, which provides the remedy for violations of the ICWA's core provisions (§§ 1911, 1912, and 1913) contains no limitations period, and Congress could well have intended none. The federal goal of informed consent, explicit in § 1913(a), can *never* be obtained unless the parent is, in fact, informed before consenting. "If, but only if, ICWA's procedures are followed does the Act achieve its purpose to establish 'minimum Federal standards...'" [RABINOWITZ, J., dissenting. App., A24.]

While Congress provided a 2-year limitations period for invalidating a valid, but voidable, consent, Congress provided no limitations period for invalidating a consent Congress intended to be void *ab initio* for failing to comply with the ICWA.

As the dissenting justice concluded, "...Congress intended that any consent obtained in violation of the strict procedural safeguards governing termination of parental rights was to have no force or effect. It follows that an adoption based on an invalid consent is void *ab initio*, and that a petition to vacate such a void decree can, pursuant to § 1914, be filed at any time." App., p. A26.

In a case, where Congress had declared a voluntary release from liability to be void under the Federal Employer's Liability Act, this Court held that if Congress has the power to enact the law itself, it has "the power to insure its efficacy by prohibiting any contract, rule, regulation or devise in evasion of it." *Second Employers' Liability Cases*, 223 U.S. 1, 52 (1912). "Of course, if a statute says that acts or proceedings shall be void if they are not done in the manner set out in the statute the statutory prescription is obviously mandatory." 2A Sutherland, *Statutory Construction* § 57.08 at p. 658 (4th ed., 1984).

Federal law, as established in the ICWA, preempts Alaska's local rule regarding statute of limitations. The rule directly conflicts with the ICWA because it operates to make valid, a consent, which Congress intended to be invalid, *i.e.*, void *ab initio*.

Furthermore, federal law holds that, "A judgment is void if the court entering it ... acted in a manner inconsistent with due process of law." "[T]here is no time limit on an attack on a judgment as void." Wright & Miller, *Federal Practice and Procedure: Civil* § 2862 at pp. 1989-200 (1973). Section 1913(a) mandates a specific due process for terminating

parental rights to Indian children. Alaska failed to comply, rendering the Alaska judgment void and subject to an attack at any time.

Assuming a case where vacating the adoption could result in removing the child from the home, even years after the adoption judgment, the ICWA is not heartless. § 1916 provides that, "...a biological parent...may petition for return of custody and the court shall grant such petition unless...such return of custody is not in the best interests of the child." The absence of a statute limitations does not limit the exercise of the discretion provided for in § 1916.

As a whole the ICWA's declared policy is "to protect the best interests of Indian children" by establishing minimum Federal standards for removal from their families and establishing adoptive placement standards which will "reflect the unique values of Indian culture..." § 1902. The deliberate severance of the mother-child relationship for the benefit of others,[5] rather than the needs of the child, is a unique middle-class white value,[6] repugnant to the unique Indian cultural and social standards[7] the ICWA was enacted to preserve. While TNF's father is the Indian parent in this case, if Congress had

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[5] The ICWA was *not* designed to prevent the breakup of adoptive Indian families, created through violations of the ICWA, as in the instant case. *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska, 1982).

[6] The ICWA seeks to protect the rights of the Indian child as an Indian by making sure, among other things, that Indian child welfare determinations are not based on "a white, middle-class standard...." House Report, at p. 24, U.S. Code Cong. & Admin.News 1978, at p. 7546.

[7] "Chickasaw child-rearing practices reflected the tribe's matrifocal system and martial tradition." Arrell M. Gibson, *The Chickasaws*, p. 20, (1971) University of Oklahoma Press, Norman, Oklahoma. "The greatest care was bestowed upon their children by the Chickasaw mothers, whom they never allowed to be placed upon their feet before the strength of their limbs would safely permit; and the child had free access to the maternal breast as long as desired, unless the mother's health forbade its continuance." H.B. Cushman, *History of the Choctaw, Chickasaw and Natchez Indians*, p. 395-396, (1899) Headlight Printing House, Greenville, Texas.

believed that only the Indian parent could serve the best interests of an Indian child, the ICWA would not have expressly granted a non-Indian parent of an Indian child the same rights as the Indian parent. § 1903(9).

## B. THE ALASKAN DECISION CONFLICTS WITH OPINIONS OF THIS COURT THAT CONGRESS INTENDED THE ACT TO SET NATIONAL STANDARDS TO BE APPLIED UNIFORMLY

The Alaska Supreme Court's decision conflicts with the principles set forth by this court just last year in *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S.Ct. 1597 (1989). In *Holyfield*, this Court addressed the issue of whether or not Congress intended the term "domicile" as used in the ICWA jurisdictional provision, § 1911(a), to be defined by state law. This court found that, for two principal reasons, Congress intended the ICWA to have a uniform application, not to be limited by varying local standards the respective states may see fit to adopt for the disposition of unrelated local problems. *Holyfield*, *supra*, 109 S.Ct., at 1606.

First, this Court concluded that Congress could not have intended the ICWA's jurisdiction provision to be subject to definition by state courts as a matter of state law, when it is clear from the legislative history that Congress perceived the States and their courts as partly responsible for the problem it intended to correct. And second, that "Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile, "in that a different finding of jurisdiction could result by merely moving the child to another state. *Id.*, 109 S.Ct., at 1607.

By analogy, such reasoning applies with equal force to the application of state limitations period. Imposing a state limitations period on all § 1914 actions to invalidate state actions in violation of the ICWA's core provisions would

result in different findings, depending on the length of a particular state statute of limitations, destroying the uniformity Congress intended, and frustrating the intent of the ICWA to solve a national problem with a national law.

The State court majority asserts that the holding in *Holyfield*, *supra*, is inapplicable to the instant case because,

> "We do not equate a decree made without jurisdiction with a decree based on a consent allegedly made in violation of a non-jurisdictional provision of ICWA (footnote omitted)." App., p. A17.

But the Alaska Supreme Court did exactly that by applying Alaska's 1-year statute of limitations to § 1914 actions, the very section which provides the remedy for lack of jurisdiction. By this logic, the state court would have us believe that Congress intended ICWA's jurisdictional provisions in § 1911 to be limited by a state statute of limitations for attacking adoption judgments as short as 6 months,[8] but that an allegation of fraud or duress in obtaining consent would be entitled to a minimum of 2 years under § 1913(d).

In essence, the State court has ruled that no violation of the federal act is sufficient to outweigh the Alaska legislature's "strong policy statement" that after 1 year, no adoption is subject to attack on any grounds, other than for fraud or duress. App., p. A15.

Because this decision affects the important fundamental parental rights of Alaska's approximately 16% Indian population[9] (*Stanley v. Illinois*, 405 U.S. 645 (1972).), thus presenting an important question for this court to settle.

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[8] Miss. Code Ann. § 93-17-15 (1972).

[9] 1980 Census of Population, Volume 1, Chapter D, Part 3, U.S. Department of Commerce, Bureau of the Census (1983).

## C. WITHOUT IMMEDIATE GUIDANCE FROM THIS COURT, OTHER COURTS WILL FOLLOW THE DECISION TO APPLY STATE STATUTES OF LIMITATIONS CREATING CONFUSION IN THE LAW

Confusion will result when each state begins to characterize each violation the ICWA's core provisions and borrow their chosen state statute of limitations.[10] An example will illustrate. One day after a judgment of adoption is entered in Florida, a parent could bring a § 1914 action collaterally attacking the judgment based on lack of informed consent as required by § 1913(a), the same collateral attack as in the instant case. However, under Florida law,[11] a consent to adoption is irrevocable upon execution, except for fraud or duress. Therefore, the day after the entry of an adoption judgment, the parent, under Florida law would have no time to collaterally attack the invalid consent.

On the other hand, if the same occurred in Alaska, as it did in this case, the parent would have 1-year to collaterally attack the adoption judgment on the same grounds. If the Florida court characterizes the § 1914 action as a collateral attack on the adoption judgment itself, rather than the consent, then the parent would have 1-year under Florida law to attack the judgment.[12] Each state will surely come to its own and varying conclusions on how to characterize an adoption attack based on invalid consents, or any other violation of the ICWA.

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[10] Limitation periods for attacking an adoption judgment vary, *see, e.g.* Fla.Stat. Ann. § 63.182 (1985) [1 year]; Colo.Rev.Stat. § 19-5-214 (1987) [2 years]; and Cal.Civ.Code Ann. § 227d (1951) [3 years].

[11] Fla.Stat.Ann. § 63.082(5) reads, "Consent may be withdrawn only when the court finds that the consent was obtained by fraud or duress." Other states have similar laws making consent irrevocable upon execution or upon entry of adoption judgment. *See e.g.*, Cal.Civ.Code Ann. § 226a (1977); Ill.Rev.Stat.Ch. 40 ¶ 1513 § 11 (1983); La.Rev.Stat. 9:422.8.A (1987); N.C.Gen.Stat. § 48-11 (1987); W.Virg.Code § 48-4-5(a)(2) (1985).

[12] Fla.Stat. Ann. § 63.182 (1985).

This case involves a step-parent adoption, thus presenting the Court with an opportunity to resolve the legal issues raised without a heart wrenching result. TNF lives with her father, and vacating the adoption would not result in removing her from the only world she has ever known. Petitioner has only sought the same visitation rights granted to any other natural mother who does not live with her child, thereby providing TNF with continuity.

## D. THE ALASKAN DECISION EXTINGUISHES ICWA RIGHTS IN VIOLATION OF WELL SETTLED FEDERAL PREEMPTION LAW

Applying any state statute of limitations, does not merely deny Petitioner access to a state court to remedy a violation of federal rights pursuant to a § 1914 action, but extinguishes the § 1913(a) rights themselves. Petitioner cannot enforce or enjoy her rights as long as Alaska refuses, on whatever state ground, to vacate an adoption judgment grounded on an invalid termination of parental rights in derogation of her § 1913(a) rights.

When Congress grants a substantive right, "State laws are not controlling in determining what the incidents of this federal right shall be." *Dice v. Akron, C.Y.Y. R.R. Co.*, 342 U.S. 359, 361 (1952). The Alaska Supreme Court's decision impermissibly qualifies a parent's right to give informed consent as provided for in § 1913(a). The decision places the burden on the parent to discover within 1 year that the state failed to provide them the rights given to them by Congress.

To enjoy or enforce their rights in a court of competent jurisdiction, a parent would be forced to investigate the whereabouts of the adopted child. In this case, Petitioner was aware of where T.N.F. resided, however, adoption proceedings are confidential, and consents to adoptions typically contain a

waiver to any notice of the adoption proceedings,[13] as did the consent document in this case. Without any notice of the adoption proceedings, a parent would be forced to file in all 50 states to preserve her federal rights, thereby creating multiple unnecessary litigation. The natural parents rights could be easily defeated by merely moving the child to a state where the statute of limitations has already run or hiding the child in a state with a very short statute of limitations.

The problems caused by voluntary waiver of parental rights and notice to further proceedings are precisely the evil Congress intended to end by enacting § 1913(a).[14] By requiring the consent to be taken before a judge, the parent knows their rights and knows exactly where to go to exercise their rights.

The holding in this case will encourage shoddy legal work and deliberate evasion of the ICWA. Irregularities in Indian adoption proceedings will multiply. Even when a child known to be of Indian heritage is the subject of an adoption, as was the instant case, an adoption based on state law will be upheld after the State's statute of limitations has run.

The right to give informed consent is crucial to the ICWA's overall goal of minimizing the termination of parent-child relationships of Indian children.[15] §§ 1903(1)(ii) and 1912(d). Petitioner's actions regarding withdrawal of her consent were based on her knowledge of her rights under Alaskan law, i.e. to change her mind and withdraw consent

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[13] *See e.g.*, W.Virg.Code § 48-4-5(a)(3) (1985) and Ill.Ann.Stat.Ch. 40 ¶ 1512 § 10 (1985).

[14] See House Report, *reprinted in* U.S. Code Cong. & Admin. News 1978, p. 7533.

[15] One can reasonably infer that in a surrogacy arrangement between sisters, the natural mother would have some visitation with her natural child as part of the child's extended family. However, Petitioner was not informed of the consequences of terminating her parental rights, that she would have no right to visitation with TNF, once the adoption was granted.

only within 10 days of executing the consent. AS § 25.23.070. Petitioner actually had the absolute right to change her mind for *another* 3 months, but was not informed of that right.

## II

## THE STATE COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW AFFECTING PARENTAL RIGHTS UNDER THE INDIAN CHILD WELFARE ACT OF 1978 WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, BECAUSE THE DECISION APPEARS TO CONFLICT WITH CONGRESSIONAL INTENT THAT IF THERE SHOULD BE A LIMITATIONS PERIOD, IT SHOULD BE A NATIONAL MINIMUM STANDARD AS SET FORTH UNDER 25 U.S.C. § 1913(d)

### A. BORROWING ANY STATE STATUTE OF LIMITATIONS PERIOD SHORTER THAN 2 YEARS IS INCONSISTENT WITH CONGRESSIONAL INTENT TO ESTABLISH MINIMUM STANDARDS FOR VACATING ADOPTION DECREES RENDERED IN VIOLATION OF THE ICWA'S CORE PROVISIONS

In the event this court finds that § 1914 actions to invalidate state actions which violate the core provisions of the ICWA should be time limited, the limitations periods should be at a minimum the same 2-year period Congress provided for in § 1913(d) because it is the most analogous federal statute on point.

The practicalities are such that a 1-year statute of limitation for attacking an Indian child adoption, could severely hamper many parents of Indian children from attacking the adoption given the size of Alaska and location of its Indian population. For example, a 15 year-old girl in bush Alaska signs a notarized consent a month before the birth of her child. The baby is taken to Anchorage soon after birth. Two

weeks after the birth she changes her mind, but her family tells her "it's too late." She doesn't have access to an objective opinion, let alone an attorney. She has no resources or opportunity to get to a rural hub for at least a year. She doesn't even know that she has rights to enforce. She loses her baby, and the baby loses it's Indian culture and society.

"Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (REHNQUIST, J., dissenting), quoted with *approval* in *Wilson v. Garcia*, 471 U.S. 261, 266 (1985).

When Congress has not established a time limitation for a federal cause of action, the general rule is to borrow the most analogous federal statute of limitations. A State statute of limitations period is borrowed only when federal law does not provide an analogous federal statute, and only if the state limitations period is not inconsistent with federal policy to do so. *Wilson v. Garcia*, *supra*, 471 U.S., at 266-67.

The express concern of Congress was providing minimum levels of protection. § 1902. Congress balanced the interests of the Indian child, the natural and adoptive parents, and determined that vacating an adoption, based on a consent obtained by fraud or duress, i.e. voidable consent, would be permitted, as a matter of federal policy, for a minimum of 2 years. § 1913(d) Logically then, the most analogous limitations period for vacating an adoption based on a consent expressly invalid under § 1913(a), i.e. a consent void *ab initio*, would be the same 2-year limitations period at a minimum.

Importantly, § 1921 provides that where a federal law applicable to a child custody proceeding provides a higher standard of protection to the rights of the parent, the state court must apply the higher standard of protection. Obviously, borrowing a 2-year limitations period for invalidating a consent, on whatever grounds, provides greater protection for the par-

ent and the child, than the 1-year limitations period provided under Alaska law.

The State court, however, rested its chosen limitations period on a "strong" State policy, "that an adoption decree should not be challenged on any ground after one year." App., p. A15. The State court judged that, "A consent obtained in violation of § 1913 of ICWA should not be more questionable than a consent obtained through fraud or duress. App., p. A14. The State court has, in effect, substituted its own judgment for that of Congress.

All the arguments made above beg for a national standard. Whether or not Congress intended a statute of limitations for § 1914 actions, it is clear from this court's ruling in *Holyfield* that one uniform national standard was to be established.

## B. REASONING OF THE ALASKA SUPREME COURT FOR CHOOSING A 1-YEAR STATUTE OF LIMITATIONS PERIOD INTOLERABLY CONFLICTS WITH PRINCIPLES FOR IMPOSING STATUTES OF LIMITATIONS AS DECIDED BY THIS COURT.

"Statutes of limitations are designed to insure fairness to defendants by preventing the revival of stale claims in which the defense is hampered by lost evidence, faded memories, and disappearing witnesses, and to avoid unfair surprise." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 455, 473 (1975).

The adoption judgment herein is invalid on its face, requiring no outside proof, memories or witnesses to establish such. The ICWA plainly states for all to see that the consent "shall not be valid." § 1913(a). Respondent, in particular, and the lower State court, knew that the ICWA could apply to the adoption, but chose not to comply with the ICWA's requirements. That Petitioner now claims her substantive

rights were violated should come as no surprise to Respondent.

On the other hand, fraud, and particularly duress, are almost entirely dependent on evidence outside the record where lost evidence, faded memories and disappearing witnesses would truly hamper a defense. Yet, by this court's reasoning such actions should be entitled to a *longer* statute of limitations because, "Fraud and duress are evils at least as serious as violations of the procedural protections contained in ICWA." App., p. A14.

But even by the State court's own logic as just stated, violations of procedural protections would be given a limitations period at least as long as one for fraud or duress, if fraud and duress are, as the State court protests, evils at least as serious as procedural violations. Therefore, the State court, following its own logic, should have borrowed the 2-year statute of limitations contained in § 1913(d) rather than its own 1-year statute of limitations.

Finally, plain old-fashioned common sense and fairness would dictate that a person challenging a governmental action against them based upon a consent void *ab initio* because it was obtained in an invalid manner, would have at least as much time to do so, if not more, than a person challenging a voidable consent obtained in a valid manner.

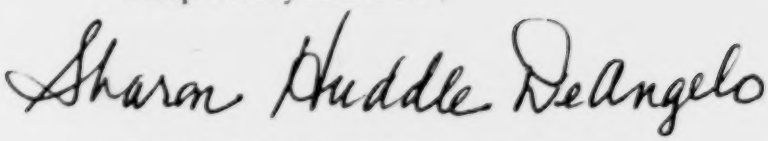
## CONCLUSION

WHEREFORE, for all, or any one of, the foregoing reasons, this court should grant the writ of *certiorari* to the Supreme Court of the State of Alaska, and summarily reverse and remand, or set the matter for briefing and argument, and such other and further relief as the court deems just and

proper under the circumstances.

Dated: January 22, 1990

Respectfully submitted,



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**Entered: October 27, 1989**

**THE SUPREME COURT OF THE STATE OF ALASKA**

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| In the Matter of The Adoption of | ) | File No. S-3104<br>3AN-86-1331 P/A |
| T.N.F., | ) | OPINION |
| a Minor. | ) | [No. 3524] |

**Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Victor D. Carlson, Judge.**

**Appearances: Karla F. Huntington, Kentch and Huntington, Anchorage, for Appellant. Sarah J. Tugman, Tugman and Clark, Anchorage, for Appellees.**

**Before: Matthews, Chief Justice, Rabinowitz, Compton and Moore, Justices. [Burke, Justice, not participating]**

MOORE, Justice.
COMPTON, Justice, concurring.
RABINOWITZ, Justice, dissenting in part.

The Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, (ICWA) provides minimum federal standards for the removal of Indian children from Indian families and allows vacation of any adoption decree rendered in violation of its terms. We first address the applicability of ICWA to the unique facts of this case. Secondly, we consider the applicability of Alaska's one-year statute of limitations to an action initiated pursuant to § 1914 of ICWA. The trial court found that the action to vacate the adoption decree was time-barred by Alaska's one-

year statute of limitations. We affirm.

## I

In 1986, SAF and BFF had been married for sixteen years. SAF could not have children. SAF's sister, LJJ, a California resident, who was married and had four children, agreed to have BFF's child for SAF. LJJ was artificially inseminated with BFF's sperm during a trip to Alaska, and then returned home to California. LJJ, the biological mother, and BFF, the biological father, have never lived together or established a family of any sort.

The child, TNF, was born in California on September 6, 1986 and is the biological daughter of BFF and his wife's sister, LJJ. Although SAF and LJJ are non-Indians, BFF is 1/32 Chickasaw Indian. Thus, the child, TNF, is 1/64 Chickasaw Indian as a result of her father's heritage. Shortly after TNF's birth, her custody was relinquished to SAF, who had arrived for the birth. SAF and BFF (hereinafter the F.s) remained in California for several weeks after the child's birth and then returned to Anchorage with her.

On November 2, 1986, LJJ signed a written consent (as did her husband) to the adoption of TNF by SAF. The consent states that LJJ "consents to the adoption of [TNF] by [SAF] and is aware that she has the right to withdraw this consent as provided in A.S. 25.23.070(b)," and that "she has read this document and fully understands that her consent to this adoption terminates her legal rights as the mother of [TNF] and freely and voluntarily consents to the adoption." LJJ made one change in the consent form.[1] She was also provided a copy of the Alaska statute concerning withdrawal of consent.[2]

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[1] She crossed out and initialed a sentence that read: "3. That [TNF] is not the member of any Indian tribe and is not the biological child of the member of any Indian tribe."

[2] LJJ was provided a copy of AS 25.23.070 which provides:

LJJ signed her consent and it was notarized in California, before a notary public for that state.

On December 12, 1986, SAF filed a petition for the adoption of TNF. Notices of the adoption proceedings were sent to LJJ and the Chickasaw Tribe. The notice noted that TNF was of Indian blood but stated that the "adoption would not terminate or modify in any fashion the parental right of [BFF] (1/32nd Chickasaw) as father of [TNF] (1/64th Chickasaw) and would merely terminate the parental rights of LJJ (non-Indian)." The notice also stated that "[i]f the Indian Child Welfare Act applies to this matter . . . the following rights may apply," and listed the pertinent rights.

In their adoption petition, the F.s contended that ICWA did not apply to this adoption since LJJ is a non-Indian and the child was to remain with her Indian father. An adoption decree was entered by the Alaska Superior Court, Judge Peter A. Michalski, in February of 1987. Judge Michalski specifically found ICWA inapplicable because the parental rights of the only Indian involved in the proceedings were not modified.

On April 18, 1988, LJJ filed a motion to vacate the adoption decree. She argued that ICWA was applicable and that her consent to the termination of her parental rights was invalid under § 1913(a) of ICWA since her consent was not "recorded before a judge."

On November 17, 1988, Judge Carlson denied the petition to vacate the decree of adoption. Judge Carlson rested his

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"Withdrawal of Consent. (a) A consent to adoption may not be withdrawn after the entry of a decree of adoption. (b) A consent to adoption may be withdrawn before the entry of a decree of adoption, within 10 days after the consent is given, by delivering written notice to the person obtaining consent, or after the 10-day period, if the court finds, after notice and opportunity to be heard is afforded to the petitioner, the person seeking the withdrawal, and the agency placing a child for adoption, that the withdrawal is in the best interest of the person to be adopted and the court orders the withdrawal."

decision on AS 25.23.140 which provides that a decree of adoption may not be questioned on any ground one year after its issuance. The court found that ICWA applied but that it "enlarges the state's statute of limitations only . . . if the consent was obtained by fraud or duress." Since there were no allegations of fraud or duress, the court found that Alaska's one-year statute of limitations barred LJJ's petition to vacate the adoption. LJJ appeals.

## II

Section 1913(a) of ICWA requires that any voluntary consent by a parent or Indian guardian to the termination of their parental rights be recorded before a judge.[3] LJJ argues that the decree of adoption is void because her consent to the adoption did not conform to this requirement, since it was only notarized by a California state notary and was not recorded before the Alaska judge.

In response, the F.s argue inter alia that 1) ICWA does not apply to this case since an "Indian family" is not involved, and 2) the one-year statute of limitations in AS 25.23.070 bars the § 1914 action.

### A. Standard of Review

The applicability of ICWA to this case and the question of whether § 1914 of ICWA incorporates state statutes of limita-

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[3] Section 1913(a) provides: "Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid." 25 U.S.C. § 1913(a)(Supp. 1987) (emphasis added.)

tions are questions of law to which we apply our independent judgment. *Sloan v. Jefferson*, 758 P.2d 81, 83 (Alaska 1988). We will "adopt the rule of law that is most persuasive in light of precedent, reason and policy." *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

**B. Applicability of the Indian Child Welfare Act**

Congress adopted the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963, in response to concerns over the consequences to Indian children, Indian families and Indian tribes of abusive state child welfare practices that resulted in the separation of large numbers of Indian children from their family and tribes.[4] In order to address these concerns, ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture."[5]

Section 1913 of ICWA provides that any "voluntary termination of parental rights" by "any parent or Indian custodian" must be "executed in writing and recorded before a judge . . . of competent jurisdiction." LJJ argues that § 1913 applies to TNF's adoption since she falls under ICWA's definition of a parent and TNF falls under the Act's definition of an Indian child. Section 1903(9) of ICWA states that "'parent' means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." We agree that as the biological parent of TNF, LJJ falls within the Act's protections in § 1913(a).

Secondly, LJJ argues that TNF falls within the Act's defini-

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[4] *See*, H.R. Rep. No. 1386, 95th Cong., 2d Sess. 8-12 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530, 7530-34.

[5] 25 U.S.C. § 1902 (Supp. 1987).

tion of an Indian child. The Act defines an Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (Supp. 1987). TNF's biological father, BFF, is a member of the Chickasaw Nation. As the biological child of BFF, TNF is also a member of the Chickasaw tribe. As a result, TNF falls within the definition of an Indian child under ICWA.

The F.s argue that the result of applying ICWA to this case would be to disrupt an Indian family, not to protect one. They urge us to follow several state court decisions holding that ICWA does not apply to the adoption of an Indian child which was never part of an Indian family. The F.s also point to language in ICWA indicating that Congress intended the act to protect Indian families.[6] The F.s also rely on the Congressional findings of purpose within ICWA in arguing that the Act should not be applied in this case.

In enacting ICWA Congress found:

> "(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them, by nontribal public and private agencies and that an alarmingly high per-

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[6] The F.s also argue that LJJ is *collaterally estopped* from relitigating the issue of the Act's application to this case since the findings of law within the adoption decree specifically note that the Act does not apply. *Collateral estoppel* applies to issues actually litigated by the parties to the prior judgment. *Bignell v. Wise Mechanical Contractors*, 720 P.2d 490, 494-95 (Alaska 1986). "Notions of fairness require that only those issues that have been fully litigated and considered by the parties should be excluded from future actions." J. Friedenthal, M. Kane, A. Miller, *Civil Procedure* 675 (1985). While LJJ was a party to the adoption action, she did not participate adversarially in the proceedings. She was not represented by counsel and the only briefing on the Act's applicability was done by the F.s' attorneys. We therefore conclude that the issue was not so fully litigated as to bar LJJ from raising it in this action to set aside the decree.

centage of such children are placed in non-Indian foster and adoptive homes and institutions; and

"(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial codes, have often failed to recognize the essential tribal relations in Indian people and the cultural and social standards prevailing in Indian communities and families."

25 U.S.C. § 1901 (Supp. 1987). In § 1902 Congress made the following declaration of policy:

"The Congress hereby declares that it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture."

25 U.S.C. § 1902 (Supp. 1987).

Several of the cases the F.s rely on[7] involved belated challenges by unwed Indian fathers to the adoption of an illegitimate Indian child.[8] The Supreme Court of Indiana ex-

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[7] *See, In the Matter of the Adoption of T.R.M.*, 525 N.E.2d 298, 302-03 (Ind. 1988); *In the Matter of the Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982); *In the Matter of the Adoption of Baby Boy D.*, 742 P.2d 1059, 1064 (Okl. 1985) *reh. den.* (1987), *cert. denied*, ____ U.S. ____, 98 L. Ed. 2d 1005 (1988); *In the Interest of S.A.M.*, 703 S.W.2d 603, 607-09 (Mo. App. 1986); *Claymore v. Serr*, 405 N.W.2d 650, 654 (S.D. 1987); *see also*, Note, *The Indian Child Welfare Act: Does It Cover Custody Disputes Among Extended Family Members?*, 1 Alaska L. Rev. 157, 160-68 (1984) (critique of this court's refusal to create an "Indian family" exception to ICWA in *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska 1982)).

[8] *See, e.g., Baby Boy L*, 643 P.2d at 175 (ICWA does not "dictate that an illegitimate infant who has never been a member of an Indian home or

panded on the holdings of these cases in *In the Matter of the Adoption of T.R.M.*, 525 N.E.2d 298, 302-03 (Ind. 1988). In *Adoption of T.R.M.*, an Indian mother arranged to have her illegitimate child adopted by a non-Indian couple. One year later, the Indian mother and the Tribe brought actions to invalidate the adoption on the grounds that it did not comply with ICWA. The court found ICWA did not apply since the child was given up shortly after birth and thus was never part of an Indian family. The court noted that "except for the first five days after birth, [T.R.M.'s] entire life of seven years to date has been spent with her non-Indian adoptive parents in a non-Indian culture." *Id.*, at 303.

*Adoption of T.R.M.* and the other cases recognizing an "Indian family" exception to the plain language of ICWA have been criticized by a number of courts.[9] In *A.B.M. v. M.H.*, 651 P.2d 1170, 1173 (Alaska 1982), *cert. denied*, 461 U.S. 914 (1982), we were urged to adopt an "Indian family" exception to the Act's coverage. There, an Indian child was adopted by the mother's sister and brother-in-law but the biological mother later sought to revoke her consent to the adoption.

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culture . . . should be removed from its primary cultural environment over the express objections of its non-Indian mother"); *Baby Boy D*, 742 P.2d 1059 (unwed father lacked standing to invoke ICWA since he never had custody and had not acknowledged or established paternity and where child never resided in an Indian family and had a non-Indian mother); S.A.M., 703 S.W.2d at 607-09 (Mo. App. 1986) (ICWA did not apply since unwed Indian father and non-Indian mother never lived as a family); *Claymore*, 405 N.W.2d at 654 (ICWA inapplicable since an Indian child resided with non-Indian mother and was never part of "Indian family").

[9] *See, e.g., In re Junious M.*, 193 Cal. Rptr. 40, 46 (Cal. App. 1983) ("We note that the trial court predicated its decision not to apply the Act in part, on its determination that the minor had developed no identification as an Indian. The language of the Act contains no such exception to its applicability, and we do not deem it appropriate to create one judicially."); *In Re Custody of S.B.R.*, 719 P.2d 154, 156 (Wa. App. 1986) ("The Browns assert that the Act does not apply where the child has never been part of an Indian family relationship. Again, the language of the Act contains no such exception, and the Browns have presented no compelling reasons to create one.").

"The prospective adoptive parents argue that because the Act was intended to remedy the agency bias that has resulted in the removal of Indian children from their cultural settings, its application is not required in the instant case. They contend that R.H.'s adoption by members of her "extended family" (M.H. and A.H.) will not deprive her of the social exposure to Indian cultural or social values the Act is designed to safeguard.

We agree that the H.'s have correctly identified one of the primary purposes of the Act, and that application in the instant case is not required to preserve R.H.'s ties to Indian culture or social values. Nevertheless, we cannot justify creating a judicial exception to the Act's coverage on this basis alone." 651 P.2d at 1173.

Similarly, we decline to create an exception to the Act's coverage in this case. We initially note that in enacting ICWA, Congress did not seek simply to protect the interests of individual Indian parents. Rather, Congress sought to also protect the interest of Indian tribes and communities, and the interest of the Indian children themselves. *See*, *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S.Ct. 1597, 1609 (1989). Reliance on a requirement that the Indian child be part of an Indian family for the Act to apply would undercut the interest of Indian tribes and Indian children themselves that Congress sought to protect through the notice, jurisdiction and other procedural protection set out in ICWA.

We have serious policy reservations concerning the creation of judicial exceptions to the plain language of ICWA as was done by the Indiana Court in *Adoption of T.R.M.* The court in *Adoption of T.R.M.* sidestepped the Act's protection by relying on the fact that the mother gave up the child shortly after its birth. Such application of an "Indian family" requirement effectively deprived both the Indian mother and her Tribe of the protection set out in the Act. It would seem that the adoption in *T.R.M.* was exactly the type of scenario in

which Congress sought to impose federal procedural safeguards in order to protect the rights of the Indian parents and their tribe.

Moreover, these judicially-created exceptions to the coverage of ICWA are somewhat suspect in light of the Act's purpose of imposing federal procedural safeguards. State courts must be particularly hesitant in creating judicial exceptions to a federal act which was enacted to counter state courts' prejudicial treatment of Indian children and communities.[10]

We certainly agree with the F.s' contention that it is very unlikely that Congress had surrogate parent arrangements in mind when it adopted the Act. However, to utilize a judicially-created "Indian family" exception would be to enter onto a slippery slope which threatens to exclude the very type of cases Congress had in mind when it adopted the Act.

Under the plain language of the statute, EJJ has standing to challenge the adoption under ICWA because she is the biological parent of an Indian child under § 1903(9).

### C. Application of State Statutes of Limitations to Section 1914 of ICWA

Section 1914 provides that "any parent or Indian custodian from whose custody [an Indian] child has been removed . . . may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of the sections 1911, 1912, and 1913 of this title." Sec-

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[10] *See, e.g., Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 1606 (1989); *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986); 25 U.S.C. § 1901(5) ("Congress finds the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families") (emphasis supplied); H.R. Rep. No. 95-1389, 95th Cong. 2d Sess. 21, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530, 7532-33.

tion 1914 does not set forth any time limitations for such a collateral attack. The only time limitations mentioned in the Act are in § 1913(d). Section 1913(d) provides that once an adoption decree is final, the parent may withdraw an otherwise valid consent to an adoption on the grounds that the consent was obtained through fraud or duress if the petition to vacate the decree is made within two years unless a longer period is allowed under state law.[11]

Judge Carlson found that since ICWA was silent as to statutes of limitations, except in the narrow situation specified in 1913(d), actions under § 1914 are governed by AS 25.23.140(b).[12] LJJ argues that incorporation of the one-year statute of limitation would frustrate the legislative intent of ensuring that voluntary consent to the termination of parental rights meet minimum federal procedural safeguards. In particular, LJJ argues that a short state-imposed statute of limitations would essentially prevent the challenge of many adoptions made in violation of ICWA.

The United States Supreme Court has consistently *held* that "[w]hen Congress has not established a time limitation for a federal cause of action, the settled practice [is] to adopt a local time limitation as federal law if it is not inconsistent with

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[11] Section 1913(d) provides: "After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted by state law." 25 U.S.C. § 1913(d) (Supp. 1987).

[12] AS 25.23.140(b) provides in part: "Subject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued, the decree may not be questioned by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter . . . ."

federal law or policy to do so." *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985).[13] The resolution of whether § 1914 incorporates state statutes of limitations thus centers on whether the one-year Alaska statute obstructs or frustrates the purposes of ICWA.

Similarly, under a federal preemption analysis of whether § 1914 prevents application of state law, we apply the following analysis:

> "first, looking to the "policy, intent, and context" of the federal statute, whether the state regulation is expressly or implicitly preempted, second, even if no declaration is found, whether the statutes conflict to the extent that (1) it is impossible to comply simultaneously with the dual regulation or (2) the state regulation obstructs the execution of the purpose of the federal regulation."

*Webster v. Bechtel*, 621 P.2d 890, 897 (Alaska 1980).

As to the first prong, Congress clearly did not preempt the entire field of family law relating to Indian children. Rather, Congress sought to impose certain minimum federal standards to ensure that Indian families and Indian culture were respected in child welfare decisions.

Thus, under both a preemption analysis and the Wilson test, the resolution of this issue centers on whether § 1914 conflicts with the state statute of limitations so as to obstruct or frustrate the purposes of ICWA.

It is clear that Congress intended state statutes of limitations to govern the withdrawal of valid consents under the

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[13] *See also, Reed v. United Trans. Union*, 488 U.S. _____, 102 L. Ed. 2d 655, 674 (1989); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986); *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

Act. Section 1913(d) provides for one exception to the application of state statutes of limitation by allowing collateral attacks on consents obtained through fraud or duress for at least two years after the final decree of adoption. The legislative history makes clear that "[t]his right is limited to two years after entry of the decree unless a longer period is provided by state law." H.R. No. 95-1386, 95th Cong., 2d Sess. 23 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 7350, 7545-46. It is therefore clear that Congress realized that state statutes of limitations might bar withdrawal of valid consent earlier than two years after the decree and wished to establish an exception to those limitations in cases of fraud or duress.

The critical issue is whether Congress intended state statutes of limitations to apply to § 1914 actions to set aside consents which are invalid under the terms of the Act. LJJ cites to one commentary on the Act which argues that invalid consents under § 1913 are void as a matter of law and not subject to state statutes of limitations. These commentators argue:

> "No specific federal statute of limitations is provided for suits brought pursuant to section 1914. It is thus possible that in many instances a parent's collateral attack upon the state decree would be barred by a state statute of limitations. However, with respect to decrees entered in violation of two particular provisions of ICWA, there may be no time limit on the bringing of a suit. In those child custody proceedings in which the tribal court had exclusive jurisdiction pursuant to subsection 1911(a), any state court orders or decrees would be void ad initio. Similarly, since parental consent obtained in violation of the ICWA is invalid as a matter of law, any subsequent state court order for foster care or adoptive placement predicated on that defective consent should likewise be void. It would seem, therefore, that if these particular violations to the Act render the state court orders or decrees void, such void orders and

decrees could be vacated by another court at any time."

Trentadue and DeMontigny, *The Indian Child Welfare Act of 1978: A Practitioner's Perspective*, 62 N.D.L. Rev. 487, 536 (1986) (footnotes omitted).

We disagree with these commentators' analysis. We initially note they do not cite any case law, nor have we found any authority,[14] for their proposition that consents in violation of ICWA can be set aside at any time. More importantly, however, it would be inconsistent to allow a collateral attack on a consent in violation of ICWA to be brought at any time but only allow collateral attacks on consents which are the product of fraud or duress within two years of the adoption decree. Fraud and duress are evils at least as serious as violations of the procedural protection contained in ICWA. A consent obtained in violation of § 1913 of ICWA should not be more questionable than a consent obtained through fraud or duress. Since Congress clearly intended that state statutes of limitations would apply to actions pursuant to § 1913(d) it is logical to assume that state statutes of limitations also apply to § 1914 actions. If Congress had intended to establish a minimum time for bringing § 1914 actions, it would have mandated a statutory minimum as it did in § 1913(d).

This conclusion is buttressed by the fact that a number of other important federal statutes have been construed to incorporate state statutes of limitations. For example, the United States Supreme Court has *held* that state statutes of limitations apply to civil rights actions under 42 U.S.C. § 1983. *Wilson*, 471 U.S., at 268; *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). State statutes of limitations have been applied to a number of other important federal causes of

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[14] *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska 1982), does not support LJJ's position that § 1914 actions can be brought at any time. The State's motion to vacate the decree of adoption in that case was made within the one year period provided for in AS 25.23.140. 651 P.2d at 1171-72.

action. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976) (§ 10(b) actions under the Securities Exchange Act of 1934); *Hawaii Carpenters' Trust v. Waiola Carpenter Shop*, 627 F.Supp. 237, 243-44 (D. Hawaii 1985) (Employee Retirement Income Security Act actions).

As a matter of policy, both the two-year federal statute of limitations in § 1913 (d) and the one-year limitation in AS 25.23.140 recognize that at some point adoptions must become final. To allow collateral attacks on final adoption decrees at any time threatens to unreasonably disrupt the upbringing of the adopted child. AS 25.23.140 is a strong policy statement by the Alaska Legislature that an adoption decree should not be challenged on any ground after one year.

Section 1914 seeks to enforce important federal procedural rights contained in ICWA. However, this interest must be balanced against the adoptive family's interests. At some point, the adopted child's relations with his or her adoptive parents needs protection from further disruption.

LJJ argues that the United States Supreme Court's recent decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597 (1989), precludes application of state statutes of limitations since such a result would disrupt uniform nationwide application of ICWA. The Supreme Court's decision in *Holyfield* centered on the question of whether state law governed the definition of "domicile" in § 1911(a) of ICWA. This section establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child "who resides or is domiciled within the reservation of such tribe." 25 U.S.C § 1911(a) (Supp. 1987). The court first noted that the proper construction of the term domicile as used in ICWA was a matter of federal law, reasoning that Congress did not intend such a critical jurisdictional term to be defined by reference to varying state laws. The Court concluded that Mississippi law defining domicile was inconsistent with "generally accepted doctrine in the country and cannot be what Congress

had in mind when it used the term in the ICWA." 109 S. Ct., at 1608. The Court therefore vacated the state court adoption decree, holding that the Choctaw tribal court had exclusive jurisdiction over the adoption pursuant to ICWA. 109 S. Ct. at 1610-11.

In their dissent, Chief Justice Rhenquist and Justices Stevens and Kennedy expressed concern that the Court's interpretation of domicile "renders any custody decision made by a state court suspect, susceptible to challenge at any time as void for having been entered in the absence of jurisdiction."[15] 109 S. Ct. at 1616. LJJ argues that the Court's reasoning dictates that a consent to adoption made in violation of § 1913(a) is likewise subject to challenging at any time. We disagree.

We initially note that the § 1914 action in *Holyfield* was brought by the Tribe within two months of the state court's adoption decree. 109 S. Ct. at 1603. As a result, the majority in *Holyfield* did not reach the issue of the time limits for such a motion since the § 1914 action was brought in a timely manner.[16]

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[15] In footnote 12, 109 S.Ct. at 1616, the dissenters noted a decision by the Utah Supreme Court, *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986), in which some two years after the petition for adoption was filed, the Indian tribe intervened in the proceedings and after appeal to the Utah Supreme Court succeeded in having the case transferred to the Tribal Court. Even assuming that Halloway did not involve a question of exclusive tribal jurisdiction under ICWA, the case does not provide support for LJJ's position that § 1914 actions may be brought at any time since a final decree of adoption was never issued in the case. The Navajo tribe therefore did not have to bring a § 1914 action to set aside the decree. Rather, the Tribe sought to intervene in the proceedings two years after the trial court ordered the adoptive parents to contact the Tribe and obtain its consent before proceeding. *Id.*, at 963. The Tribe intervened after negotiating informally for the child's return. *Id.*, at 963 n.1. The trial court denied the Tribe's motion to transfer the case to the Tribal court pursuant to § 1911(b). *Id.*, at 963-64. The Utah Supreme Court reversed, holding that the Navajo Nation had exclusive jurisdiction over the child. *Id.*, at 972.

[16] Mississippi law requires that an action to set aside a final decree of adoption be brought within six months. Miss. Code Ann. § 93-17-15 (1987).

More importantly, however, unlike the state chancery court in *Holyfield*, the superior court in the case at bar had jurisdiction over the adoption when it issued its decree.[17] We do not equate a decree made without jurisdiction with a decree based on a consent allegedly made in violation of a non-jurisdictional provision of ICWA.[18] It is well-settled law that decrees issued by a court without jurisdiction are void and generally may be set aside if relief is sought within a reasonable time. Restatement (Second) of Judgments §§ 65, 69, (1982); C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2862 , at 198-200 (1973). The same is not true of erroneous judgments. *Title v. United States*, 263 F.2d 28, 31 (9th Cir.), *cert. denied*, 359 U.S. 989 (1959); *Bowers v. Board of Appeals*, 448 N.E.2d 1293, 1295 (Mass. App.), *rev. den.* 451 N.E.2d 1167 (1983); *Wright & Miller, supra* § 2862, at 198-200.

We therefore conclude that ICWA incorporates state statutes of limitations except in challenges based on fraud or duress which are governed by the two-year statute of limitations in § 1913(d). Since LJJ does not raise any allegation of fraud or duress,[19] we conclude that application of a state statute of limitations is appropriate to determine whether LJJ's challenge to the adoption decree is time barred.

**D. Does the Alaska or California Statute of Limitations Apply to this Action?**

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[17] The exclusive tribal jurisdiction provisions in § 1911(a) are not at issue in this case. It is not alleged that T.N.F. has ever resided or is domiciled within the Chickasaw Reservation.

[18] *See*, Annotation, *Validity and Construction of Statutes Imposing Time Limitations Upon Actions to Vacate or Set Aside an Adoption Decree or Judgment*, 83 A.L.R.2d 945, 949-50 (1962) ("In the absence of fraud, the courts have declined to accept lack of the requisite consent to the adoption by one of the parties necessary, or other procedural irregularities, as grounds for excluding the application of time limitation provisions for attacks on the adoptions").

[19] At oral argument, counsel for LJJ specifically conceded that fraud or duress in obtaining the consent was not an issue in this case.

LJJ argues that if state statutes of limitations apply to § 1914 actions, the superior court erred in applying Alaska's one-year limitation rather than California's three-year limitation. Since LJJ did not raise this issue in the trial court, she poses her argument in terms of a constitutional due process violation.

A state violates federal due process if it applies its own substantive law to a transaction with little or no relationship to the forum state. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). A state "must have a 'significant contact or aggregation of contacts' to the claims . . ., contacts 'creating state interests,' in order to ensure that the choice of [state] law is not arbitrary or unfair." *Shutts*, 472 U.S. at 821.

Alaska has sufficient contacts with and interests in this adoption to ensure that application of Alaska law was not arbitrary or unfair to LJJ. The original decree was issued by an Alaska court, the adoptive child and her family live in Alaska, TNF was conceived in Alaska, LJJ consented to the adoption in an Alaska court, the consent stated that Alaska law governing withdrawal of consent prior to entry of a decree applied to this adoption, and LJJ invoked the jurisdiction of the Alaska court to set aside the decree.[20] We therefore conclude that the application of Alaska law conformed to the dictates of due process.

## IV

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[20] *See, In re Appeal in Prima County Juvenile Action No. B-7087*, 577 P.2d 723, 724 (Ariz. App. 1977) ("Adoption being a status, its creation and existence is governed by the law of the forum creating such status. 1 Conflict of Law, Restatement 2nd, § 78"), affirmed, 577 P.2d 714 (Ariz. 1978); *In re Adoption of J.L.H & J.P.H.*, 737 P.2d 915, 918-20 (Okl. 1987); *Watkins v. Chirrick*, 526 P.2d 1399, 1401-02 (Or. App. 1974); *In re Adoption of MM*, 652 P.2d 974, 980 (Wyo. 1982) (Wyoming law not New York law applied since adoptive child resided in Wyoming and action brought in Wyoming. Wyoming therefore had the "greatest interest in the child's welfare and should properly apply its own law"); Restatement (Second) of Conflict of Laws § 78 (1971).

In conclusion, we find that Judge Carlson correctly applied the one-year statute of limitations contained in AS 25.23.140(b) so as to bar LJJ's § 1914 action to vacate the adoption decree. The judgment of the superior court is AFFIRMED.

COMPTON, Justice, concurring.

I agree with the result the court reaches, but do not agree with its reasoning. In my view, the Indian Child Welfare Act (Act), 25 U.S.C. §§ 1901-1963 (1983) does not apply to LJJ's action to set aside the decree of adoption. Since LJJ cannot avail herself of the Act's protections, we have to look no farther than AS 25.23.140(b) to resolve the case.

Through United States Const. art. I, § 8, cl. 3 and other constitutional authority, the United States reserved to Congress the power to regulate commerce with Indian tribes, and plenary power over Indian affairs. The Indian Child Welfare Act is grounded in this special relationship between the United States and Indian tribes and their members, and Federal responsibility to Indian people. The import of the Act's congressional findings, 25 U.S.C. § 1901, and declaration of congressional policy, 25 U.S.C. § 1902, is a concern for Indian culture, Indian tribes, Indian tribal members, Indian families, and Indian children. The purpose of the Act is to protect the universe of Indian people by protecting discreet segments of that universe. The principal malefactor is the non-Indian and non-Indian agency, public or private.

I join with the court in rejecting the so-called "Indian family" exception to the plain language of the Indian Child Welfare Act. Such an exception could lead too easily to chicanery which would defeat the very purpose of the Act. I do not agree with the court, however, that the non-Indian in this case, LJJ, may avail herself of the protections of the Act to further purposes which have nothing to do with furtherance of Indian welfare, so emphatically determined by Congress to be in need of protection.

According to affidavits filed on behalf of SAF and BFF, there came a point after the birth of TNF when her biological mother, LJJ, began to regret her surrogate parent role and re-

sent other family members, including her parents and her sisters, one of whom, SAF, had become the adoptive mother of the child. Following an apparent suicide attempt, LJJ began collecting material regarding surrogate parenthood. She sent packets of anti-surrogacy material to her mother and another sister, including press clippings regarding her own case and the efforts being made by the National Coalition Against Surrogacy to assist her. Apparently she testified in support of an anti-surrogacy bill before a legislative body, and appeared in television programs in both Seattle and Los Angeles, during which she espoused her anti-surrogacy views. LJJ's mother opines that LJJ may be attempting to obtain remuneration by creating publicity regarding her case.

It is within this context that LJJ seeks to avail herself of the protections of the Act. Regardless of the merits of her anti-surrogacy views, or other personal reasons she may have for wanting to set aside the decree of adoption, nothing LJJ has advanced furthers the cause of Indian Welfare. Although she has provided an affidavit in which she states that it is not her present intention to obtain custody of TNF, she is seeking significant visitation rights to further both her desire to have the best maternal relationship with TNF that circumstances permit and her desire that TNF and her other children get to know one another. While these goals may be born of the best intentions, I submit that the Act is not the appropriate vehicle to achieve them. As the trial judge correctly noted, LJJ's legal position would defeat the very purpose the Act was enacted to serve.

The Supreme Court of New Jersey had occasion to discuss the Act at length in *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988). In that case, the unwed Indian mother took her baby from her home in a town bordering the Rosebud Sioux Indian Reservation to New Jersey for adoptive placement. She and the putative father already had one child; and allegedly she told the putative father that he was the father of this baby. At about the time of birth of

the baby, the putative father returned to his family home in a nearby town, where he remained until approximately a month after birth. When he returned and began again to live with the mother, he learned that the baby had been placed for adoption. He did nothing for approximately 21 months, at which time he filed suit to set aside the adoption. The suit was filed one day before the expiration of the relevant statute of limitations. He never sought to establish paternity by either a court proceeding, written acknowledgement of paternity or holding out the baby as his own. It was on this basis that the New Jersey Supreme Court rejected the putative father's argument, since 25 U.S.C. § 1903(9) excludes an unwed father from the definition of "parent" under the Indian Child Welfare Act where paternity has not been acknowledged or established. Since only a parent or Indian custodian can invalidate an action for termination of parental rights, 25 U.S.C. § 1914, the putative father in this case could not prevail.

The case is of interest in several respects. First, it rejected the "Indian family" exception, just as does this court today. I find its reasoning persuasive. Additionally, it rejected a related argument that since the child was never in the putative father's custody, the child was not "removed" from the putative father's custody and thus the putative father had no standing under 25 U.S.C. § 1914 to challenge the adoption. Again, I find the court's reasoning persuasive. However, it is clear throughout the opinion that the court assumes that the "parent" referred to in the Act is an Indian parent, not a non-Indian parent. Furthermore, as the court develops extensively, the entire thrust of the Indian Child Welfare Act is the protection of Indian people. The clear implication is that the Indian Child Welfare Act should not be applied where its application is inconsistent with that purpose.

In concluding its decision, the court observes:

"The Act provides *Indian parents* the right to challenge even a final judgment of adoption in situations

where a non-Indian would have no right to complain; it is only [the putative father's] unexcused delay in establishing his right as a parent that prevents him from taking advantage of the benefits provided by the Act."

*Child of Indian Heritage*, 543 A.2d at 943. (Emphasis added).

Whether LJJ is sincere in her declaration that she does not intend to gain custody of TNF is not significant. What is significant is the principle she seeks to establish; a non-Indian may avail himself or herself of the protections of the Act, even when the result would be to stand the Act on its head.[1] LJJ was not without rights and remedies, for she had both under state law. In my view what she does not have are rights and remedies created especially for Indian people, when the principal she is seeking to establish inevitably would lead to results which would defeat the purposes of the Act.

I recognize that my construction of "parent" to include only a biological Indian parent may be open to the same criticism that has been leveled against the "Indian family" exception of the related "custody" exception derived from 25 U.S.C. § 1914. However, it is clear that "parent" does not necessarily include all biological parents, and further that it does not include a non-Indian person who has adopted an Indian child. Taken in context, I do not believe that a construction of the term

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[1] The court acknowledges how unlikely it is that Congress had a situation such as TNF's in mind when the Act was adopted (Op. at 14) and yet it proceeds to apply the Act. Although the "plain meaning" of the Act speaks to the court's result, it is a general rule of construction that "a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers." *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1902). *See*, also, *People v. Hannon*, 486 P.2d 1235, 1238 (Cal. 1971) (literal interpretation of a statute is not necessarily controlling and will be rejected if it leads to an absurdity); *Allen v. Multanomah County*, 173 P.2d 475, 478 (Or., 1946) (in arriving at the legislative intention, it is proper for the court to take into consideration the policy and purposes of the act, and to consider, in that connection, whether or not such policy and purposes will be attached by a literal interpretation of the language used).

"parent" that excludes non-Indian biological parents is an unreasonable one.

RABINOWITZ, Justice, dissenting in part.

I agree with the court's holding that the Indian Child Welfare Act applies to L.J.J.'s petition to vacate the adoption decree here in question, and further agree with the court's rejection of the "Indian family" exception to the Act's coverage. L.J.J. has standing to challenge the adoption because she is the biological parent of T.N.F., an Indian child. I cannot agree with the court's holding that the one year statute of limitations provided in AS 25.23.140(b) bars L.J.J.'s § 1914 action to vacate the adoption decree.

As the majority notes, "The critical issue is whether Congress intended state statutes of limitations to apply to § 1914 actions to set aside consents which are invalid under the terms of the Act." Maj. Op. at 8 (emphasis in original). In my view Congress' intent is clear. State statutes of limitations are inapplicable in circumstances where a § 1914 action is based on noncompliance with the provisions of § 1913(a).

Section 1913(a) provides:

> "Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, *such consent shall not be valid unless* executed in writing and *recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.* The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that is was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid."

25 U.S.C. § 1913(a) (Supp. 1987) (emphasis added).

Given the unambiguous text of § 1913(a), I conclude Congress intended that any consent obtained in violation of the strict procedural safeguards governing termination of parental rights was to have no force or effect. It follows that an adoption based on an invalid consent is void ab initio, and that a petitioner to vacate such a void decree can, pursuant to § 1914, be filed at any time.

Admittedly, the factual circumstances of this case are highly unusual and there are significant considerations which militate against disturbing any parent-adoptive child relationship. Nevertheless, I believe that my reading of §§ 1913(a) and 1914 is consonant with Congress' overall intent in enacting the Indian Child Welfare Act and with the specific intent reflected in the procedural safeguards proved in § 1913(a).

It is apparent that the provisions of § 1913(a) were designed to increase the likelihood that a consent to termination of parental rights was in fact voluntarily given. If, but only if, ICWA's procedures are followed does the Act achieve its purpose to establish "minimum Federal standards for the removal of Indian children from their families." 25 U.S.C. § 1902 (Supp. 1987). If, but only if, such procedures have been followed should a parent of an Indian child need allege fraud, duress, or other misconduct.

I cannot agree that the absence of fraud or duress under § 1913(d) impliedly limits the protection of § 1913(a). § 1913(d) delimits minimum not maximum protection; it expands not contacts the rights of Indian parents. The majority instead construes the narrow provision of § 1913(d) to restrict the broad scope of ICWA and hobble its purpose.[1]

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[1] The legislative history of ICWA discloses that Congress was aware of the following considerations: "The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law. .

I would hold the L.J.J.'s petition to vacate the adoption decree is not barred by the one year statute of limitations of AS 25.23.140(b).[2]

. . Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments." *See*, H.R. Rep. No. 1386, 95th Cong. 2d Sess. 11 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530, 7533.

[2] In reaching this conclusion I reject appellee's harmless error and substantial compliance arguments as lacking in merit.

**Filed: November 17, 1988**

**THE SUPERIOR COURT FOR THE STATE OF ALASKA**
**THIRD JUDICIAL DISTRICT**

| | | |
|---|---|---|
| In the Matter of the Adoption of: | ) | No 3AN-86-1331 P/A |
| [T.N.F.], | ) | |
| | ) | |
| A Minor. | ) | |

**MEMORANDUM OF DECISION AND ORDER DENYING PETITION TO VACATE DECREE OF ADOPTION**

This case concerns the specific wording of the Indian Child Welfare Act, 25 U.S.C. § 1901, et seq., specifically § 1913(a) which reads:

> "(a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid."

[T.N.F.] is the biological daughter of Lori Jean Jasso and Bruce F. Finney. The petitioner for adoption is Sherry A. Finney, the wife of Mr. Finney and sister of Ms. Jasso. Ms. Jasso agreed to have a child for her sister and her sister's hus-

band using semen donated by Mr. Finney. Mr. Finney is an Indian. Both Ms. Jasso and Mrs. Finney are not Indians.

The child was born September 6, 1986. Ms. Jasso gave her notarized consent of the adoption on November 2, 1986. The decree of adoption was signed February 18, 1987. On April 18, 1988, Ms. Jasso petitioned to vacate the adoption on the grounds that her consent did not meet the requirements of 25 U.S.C. § 1913(a) in that it was not "recorded before a judge. . ."

If [T.N.F.] was not an Indian child, Ms. Jasso could not withdraw her consent to adoption after the entry of the decree of adoption. AS 25.23.070. And the decree itself could not be challenged on any ground after one year from its entry. AS 25.23.140 which provides:

> "Subject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued, the decree may not be questioned by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter, unless, in the case of the adoption of a minor the petitioner has not taken custody of the minor, or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period."

25 U.S.C. § 1913(d) provides with regards to collateral attack:

> "After the entry of a final decree of adoption of an Indian child in any State Court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the

court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law."

Reading the above-quoted federal and state laws together, it appears that the only grounds upon which a decree of adoption of a minor, when the adoptive parent has taken custody of the minor and the decree has been in effect for more than one year, can be challenged is if the consent was obtained through fraud or duress. No allegation of fraud or duress has been alleged in this case. The Indian Child Welfare Act only enlarges the state's statute of limitations in this one area, if the consent was obtained by fraud or duress. Nothing in the legislative history provides the basis for an argument to the contrary. 1978 U.S. Code Cong. and Adm. News, p. 7530 at 7545.

Therefore, IT IS ORDERED that the petition to vacate the decree of adoption is denied.

DATED at Anchorage, Alaska, this 17th day of November, 1988.

*/s/ Victor D. Carlson*
Victor D. Carlson
Superior Court Judge

This is to certify that a copy of the above was mailed on the 17th day of November, 1988, to:

Sarah J. Tugman, Esq.
Karla F. Huntington, Esq.

Ruth Willard (initialed/RW)
Secretary to Judge Carlson

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***Supremacy clause versus States' rights***

From the foregoing, it is clear that Congress has full power to enact laws to protect and preserve the future and integrity of Indian tribes by providing minimal safeguards with respect to State proceedings for Indian child custody. The final question is, paraphrasing the Department of Justice; "Does Congress have power to control the incidents of child custody litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising jurisdiction over what is traditionally a State matter?"

First, let it be said that the provisions of the bill do not oust the State from the exercise of its legitimate police powers in regulating domestic relations.

The decisions of the Supreme court will set to rest the principal objection. It is appropriate to begin with the landmark case of *McCulloch v. Maryland*, 17 U.S. 316 (1819),[18] where the Court stated:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of

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[18] 4 L.Ed. 579.

the Constitution, are constitutional."

In *Brown v Western Ry. Co.*, 338 U.S. 294 (1949),[19] the Court said:

> "The argument is that while state courts are without power to detract from "substantive rights" granted by Congress * * * they are free to follow their own rules of "practice" and "procedure" * * *. A long series of cases previously decided, from which we see no reason to depart,
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> [page 18]
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> makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by forms of local practice. * * * Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by Federal laws."

In *Dice v. Akron, C.Y.Y. R.R. Co.*, 342 U.S. 359 (1952),[20] the Court *held*:

> "Congress * * * granted petitioner a right * * *. State laws are not controlling in determining what the incidents of this Federal right shall be."

Chief Justice Homes, in *Davis v. Wechsler*, 263 U.S. 22 (1923),[21] put it succinctly:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers,

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[19] 70 S.Ct. 105, 94 L.Ed. 100.

[20] 72 S.Ct. 312, 96 L.Ed. 398.

[21] 44 S.Ct. 13, 68 L.Ed. 143.

the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of slocal practice."

We will quote merely two other cases to support the proposition that Congress may, constitutionally, impose certain procedural burdens upon State courts in order to protect the substantive rights of Indian children, Indian parents, and Indian tribes in State court proceedings for child custody.

The Court, in *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923),[22] *held* that:

"The laws of the United States cannot be evaded by the forms of local practice * * *. The local rules applied as to the burden of proof narrowed the protection that the defendant had secured (under Federal law), and therefore contravened the law."

And finally, in an extensive quote from the landmark decision of the Court in *Second Employers' Liability Cases*, 223, U.S. 1 (1912), we examine the duty of State courts, otherwise having jurisdiction over the subject matter, to enforce Federal substantive rights:

"We come next to consider whether rights arising from congressional act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion * * *. (The State court was of the opinion that it could decline to enforce the Federal right) because * * * it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standard of right established by congressional act and in others the different standards recognized by the laws of the State. * * * It never has been supposed

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[22] 44 S.Ct. 11, 68 L.Ed. 140.

that courts are at liberty to decline cognizance of cases merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.

"We conclude that rights arising under the (Federal) act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion."

[page 19]

*Conclusion*

Under the rules of the House, this committee has been charged with the initial responsibility in implementing the plenary power over, and responsibility to, the Indians and Indian tribes. In the exercise of that last responsibility, the committee has noted a growing crisis with respect to the breakup of Indian families and placement of Indian children, at an alarming rate, with non-Indian foster or adoptive homes. Contributing to this problem has been the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.

While the committee does not feel that it is necessary or desireable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.